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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

IN RE ATLANTIC RICHFIELD COMPANY,
Petitioner.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit and the Honorable Dorothy W. Nelson and Stephen Reinhardt, Judges, United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Petitioner Atlantic Richfield Company ("ARCO") respectfully submits this reply brief in support of its Petition for a Writ of Mandamus (the "Petition").

ARGUMENT

The Brief in Opposition ("Opp. Br.") of USA Petroleum Company ("USA") argues (1) that a writ of mandamus is not justified because the Ninth Circuit decision permitting USA to try to prove antitrust injury does not conflict with this Court's mandate, and (2) that ARCO's petition is premature. USA is wrong on both counts. USA's first argument relies entirely on mischaracterizations of this Court's opinion, ARCO's argument and the record. *See* pp. 2-7. USA's second argument ignores the Ninth Circuit's March 17, 1993 Order (Petition Appendix C), which shows that the Ninth Circuit already has rejected ARCO's argument that the remand

decision impermissibly conflicts with this Court's mandate. The Ninth Circuit's rejection of that argument, which is the only argument raised by ARCO's Petition, makes the issue ripe for review by this Court. *See* pp. 7-8.

I. USA CHARACTERIZES THE NINTH CIRCUIT'S OPINION AS CONSISTENT WITH THIS COURT'S MANDATE ONLY BY MISREADING THE COURT'S OPINION, MISCONSTRUING ARCO'S ARGUMENT AND DISTORTING THE RECORD

A. USA's Argument That This Court Left Open The Issue Of Whether USA Suffered Antitrust Injury Is Incorrect

USA's effort to prove that this Court did not definitively dispose of USA's Sherman Act § 1 claim for lack of antitrust injury is based on its assertion that:

> "The single holding in this court's decision was that a vertical maximum price-fixing agreement 'does not cause a competitor antitrust injury unless it results in predatory pricing.' "

Opp. Brief at 6-7. In describing this statement of antitrust injury law as the "single holding" in the opinion, USA ignores the sentence in the opinion in which the Court actually announced its holding. In language that could not be clearer, the Court stated: "We . . . *hold* that respondent has failed to meet the antitrust injury test in this case." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335 (1990) (emphasis added). The Court repeated its holding in the final paragraph of the opinion: "Respondent has failed to demonstrate that it has suffered any antitrust injury." 495 U.S. at 346. This holding unequivocally disposed of USA's Sherman Act § 1 claim and left no issue open for the Ninth Circuit to decide.[1] Only by ignoring the parts of the opinion

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[1] Had this Court believed that it was leaving any issue open for the Ninth Circuit to decide, it would have said so. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 24 (1979) (reversing judgment of

where the Court stated its holding can USA construct an argument that the Ninth Circuit's decision permitting it to try to prove antitrust injury does not conflict with this Court's mandate.

Notwithstanding this Court's holding, USA argues that it should be entitled on remand to establish antitrust injury by proving predatory pricing. USA states: "[c]ontrary to ARCO's argument, this Court did not decide the basic issue of whether USA could prove predatory pricing that caused it antitrust injury." Opp. Brief at 7. USA misrepresents ARCO's position and fails to grasp the scope of this Court's holding. ARCO has never contended that this Court decided whether ARCO's pricing was predatory. Indeed, ARCO's Petition acknowledges that this Court's holding is based upon the assumed premise that ARCO's pricing was not predatory. Petition at 8. The point is that this Court did not need to determine whether USA could prove that ARCO engaged in predatory pricing because this Court was entitled to assume (as it did assume) that USA could not make such a showing. The Court was entitled to make this assumption because USA had deliberately abandoned its predatory pricing claim below. USA did not even try to prove predatory pricing when such a showing was required to oppose ARCO's summary judgment motion, which was based on the proposition that USA could not prove predatory pricing. And it did not challenge in the Ninth Circuit the district court's express finding that it could not prove predatory pricing.[2] *See* USA's Opening Brief in

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court of appeals and remanding "for further proceedings *to consider any unresolved issues that CBS may have properly brought to the Court of Appeals*") (emphasis added). The Court here simply remanded "for further proceedings consistent with this opinion." 495 U.S. at 346.

[2] USA now argues that it was not required to raise the predatory pricing issue in the lower courts because ARCO's summary judgment motion was not based on the absence of predatory pricing. Opp. Br. at 7-8. USA's assertion is wrong. ARCO rested its sum-

the Ninth Circuit, at 6 (acknowledging that USA had "offered no proof on predatory pricing or dangerous probability of monopolization" in the district court); *see also USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 689 (9th Cir. 1988) (identifying as the sole issue on appeal "whether *in the absence of predatory pricing* a competitor can recover damages because of a resale price agreement") (emphasis added).[3]

Contrary to USA's assertion, there is no rule of law that "[t]his Court's failure to decide an issue explicitly leaves that issue open for consideration by the lower court." Opp. Br. at 6. USA cites *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970), and *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129, 134 (1921), but neither supports USA's argument. The correct rule is that an issue need not be expressly decided by the Supreme Court to be fore-

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mary judgment motion squarely on the proposition that USA could establish antitrust injury only if it could establish predatory pricing, and that USA could not establish predatory pricing. Docket Number 83 at 10, 16-18. And, at the hearing on the motion, USA *agreed* that it could not prove predatory pricing, because ARCO posed no dangerous probability of monopolization. USA's counsel there stated: "I believe there is no dangerous probability of monopolization and *therefore* the idea that this price is predatory . . . even by the most liberal standard, is probably going to fail." 10/14/86 Tr. 19 (emphasis added). Finally, the district court expressly found that USA could not prove that ARCO's prices were predatory: "[U]nder the circumstances here concerned . . . no such showing [that ARCO prices were predatory] can be made." Petition Appendix E, ¶ 5. It is far too late in the day for USA to argue that ARCO's original motion was not based on the absence of predatory pricing.

[3] ARCO's Reply Brief In Support Of Petition For Writ Of Certiorari (at 5-8) spelled out these and other facts showing USA's abandonment of its predatory pricing claim in the district court and the Ninth Circuit. These facts are also set forth in detail in Judge Alarcon's dissent from the Ninth Circuit's opinion on remand and the accompanying appendix. 972 F.2d at 1077-87; *see, e.g.*, 972 F.2d at 1081 ("USA informed the district court and this court that it offered no evidence on predatory pricing").

closed from further consideration, as long as it is "within [the] compass" of the Court's mandate. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939) (matters not expressly decided by the Supreme Court may still be within the Court's mandate). The issue whether USA could prove antitrust injury by establishing predatory pricing is certainly "within the compass" of this Court's holding that USA "has failed to meet the antitrust injury test in this case." 495 U.S. at 335.

NAACP v. Alabama, 360 U.S. 240 (1959) (cited in Petition at 13-14), demonstrates that the Court can fully dispose of a case even when the disposition is based upon a premise it assumed rather than decided. USA disputes this, and contends that the Court in *NAACP* based its holding on a finding of fact that it made (rather than on an assumed premise). But USA's contention is incorrect. The Court did not make any finding that the NAACP had complied with the production order except for membership lists; rather, it assumed that this was the case because the State of Alabama had never argued otherwise. *Id.* at 243 ("[t]he State made not even an indication that other portions of the production order had not been complied with," which led the Court to presume that the NAACP had "*apparently* complied satisfactorily with the production order, except for the membership list") (emphasis added). This was the assumption, or "premise," "on which the Court disposed of the case," and the Court held that the State's post-disposition attack on that premise came too late. *Id.* at 243. Similarly, USA's attack on this Court's assumption also comes too late. " 'Whatever was before the Court, and is disposed of, is considered as finally settled.' " *Id.* at 244-45.

By intentionally choosing not to challenge ARCO's showing on predatory pricing when it was required to in the lower courts, USA foreclosed itself from raising this issue, which permitted this Court to hold that USA "has

failed to demonstrate that it has suffered any antitrust injury." 495 U.S. at 346.

B. USA's Argument That This Court Did Not Rule That A Competitor Must Prove Predatory Pricing Under Sherman Act § 2 Standards In Order To Establish Antitrust Injury Under Sherman Act § 1 Is Incorrect

In addition to failing to recognize that this Court's opinion completely disposed of USA's showing on antitrust injury, the Ninth Circuit also ignored this Court's statements that a competitor-plaintiff in a § 1 case can prove antitrust injury only by establishing predatory pricing in violation of § 2. USA does not dispute that the Ninth Circuit on remand ruled that § 2 standards are irrelevant to the antitrust injury issue in a § 1 case. But, USA contends that the Ninth Circuit's opinion is consistent with this Court's opinion, which it asserts "went out of its way to note the distinction between Section 1 . . . and Section 2." Opp. Br. at 10-12.

USA's argument simply cannot be squared with this Court's opinion. The Court "reject[ed]" USA's argument that it "suffered antitrust injury even if petitioner's pricing was not predatory under § 2 of the Sherman Act." 495 U.S. at 339. USA asserts that this means only that a competitor must prove price-fixing at "predatory levels," and need not show conduct in violation of § 2. Opp. Br. at 12. But USA's interpretation gives no effect to the phrase "under § 2 of the Sherman Act." By adding "under § 2 of the Sherman Act" after "predatory," the Court stated that predatory pricing required for antitrust injury in a § 1 case must satisfy the requirements of § 2, including threatened monopolization.[4]

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[4] USA's footnote 6 (Opp. Br. at 11), which notes that ARCO's petition for certiorari did not seek review of the dangerous probability of successful monopolization issue, is beside the point. ARCO did not need to seek review of that issue because it was

II. ARCO'S PETITION IS RIPE FOR REVIEW

Seven months after ARCO filed its petition for rehearing and suggestion for rehearing *en banc*, the Ninth Circuit issued its order withdrawing the "case" "from submission pending a decision from the Supreme Court in *Liggett*." Petition Appendix C. By issuing this order, the Ninth Circuit showed that it had rejected ARCO's rehearing petition to the extent it is based on the failure of the Ninth Circuit to obey this Court's mandate in this case. Nothing in *Liggett* is or possibly could be relevant to this issue, which is determined solely by comparing the Ninth Circuit's opinion on remand with this Court's opinion. By rejecting ARCO's inconsistency argument, the Ninth Circuit effectively has made its final required disposition.[5] The Ninth Circuit's disobedient action is therefore ripe for correction by this Court by a writ of mandamus.

The two cases cited by USA to support its contention that ARCO's petition for a writ of mandamus is premature are inapposite. Each of those cases involved a petition for a writ of *certiorari*. *Department of Banking v. Pink*, 317 U.S. 264 (1942); *Missouri v. Jenkins*, 495 U.S. 33 (1990) (cited in Opp. Br. at 4). The time limitations involved in applying for a writ of certiorari do not apply to a petition for an extraordinary writ. *Compare* S. Ct. Rules 13 and 20. Indeed, the Court's discretion to grant

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entitled to rely on the district court's unchallenged finding that USA could not prove predatory pricing. In any event, USA *did* present this issue in its "Questions Presented" in its brief on the merits. *See* USA's Brief for Respondent, at i ("must a competitor prove, in order to demonstrate antitrust injury, that the price-fixers . . . had a dangerous probability of successful monopolization. . .").

[5] The Ninth Circuit is not required to rule on ARCO's suggestion for rehearing *en banc*. "'A suggestion is neither a petition nor a motion; consequently, it requires no disposition by the Court.'" *Missouri v. Jenkins*, 495 U.S. 33, 47 n.14 (1990) (quoting Ward, *The Federal Rules of Appellate Procedure*, 28 Federal B.J. 100, 110-11 (1968)).

a writ of mandamus is "very broad," and, as opposed to a writ of certiorari, the Court need not wait for a formal entry of judgment or denial of rehearing in the circuit court. R. L. Stern, E. Gressman & S. M. Shapiro, *Supreme Court Practice* 503 (6th ed. 1986). Under the unique circumstances of this case, in which the Ninth Circuit has effectively denied ARCO's rehearing petition but has precluded ARCO from petitioning for a writ of certiorari, mandamus is the only remedy available.

CONCLUSION

For the reasons stated above and in ARCO's Petition, a writ of mandamus should issue to compel Judges Nelson and Reinhardt to follow this Court's mandate.

Respectfully submitted,

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